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No. 83-1237

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the evidence was sufficient to support the district court's judgment that petitioner is not a national of the United States.

(I)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 714 F.2d 72. The opinion of the district court (Pet. Supp. App. A7-A10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A petition for rehearing was denied on October 26, 1983 (Pet. App. A6). The petition for a writ of certiorari was filed on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 24, 1974, the Immigration and Naturalization Service instituted deportation proceedings against petitioner on the ground that he had entered the United States without a valid entry document, in violation of 8 U.S.C. 1251(a)(1). The sole contested issue at the deportation hearing was whether petitioner was a natural born

citizen of the United States. On the basis of evidence that petitioner was born in 1933 in Imuris, Sonora, Mexico, the immigration judge concluded that petitioner was not a United States citizen and hence was deportable. The Board of Immigration Appeals affirmed. On petition for review, the court of appeals held that petitioner had raised a nonfrivolous claim to American citizenship; accordingly, it transferred the proceedings to the United States District Court for the District of Arizona pursuant to 8 U.S.C. 1105a(a)(5) for a de novo hearing on petitioner's claim.

2. At trial, petitioner's Mexican birth was established by evidence of the official registration of his birth in that country, and by evidence that, while Arizona law required the registration of all births within the State and the births of petitioner's Arizona-born siblings were so registered, a search of the state records disclosed no birth registration for petitioner.

The evidence showed that petitioner's birth in Mexico on November 29, 1933, was registered in Imuris, a district capital, on December 15, 1933; the registration was signed by petitioner's father and stated that birth had occurred "in this town" (E.R. 75). The birth was also registered in Hermosillo, the capital of the State of Sonora (E.R. 67). A Mexican official testified that under Mexican law birth registration takes place in the district capital and duplicates are sent annually to the state capital (Tr. 218). The newborn child must be physically presented to the registrar (Tr. 193-196), and hence there is normally a delay between birth and registration. The parents of a child born in the United States can have the birth registered in Mexico; in such a case, the Mexican registration will reflect the United States birth (Tr. 232).

To support his contention that he had been born in Nogales, Arizona, petitioner offered a baptism certificate issued in that town in 1936 which stated that Nogales was

his residence (Tr. 54-55; Exh. D). In addition, petitioner's oldest brother and a family friend testified that petitioner had been born in Nogales, and petitioner's three younger siblings testified that it was common knowledge within the family that petitioner had been born in Nogales. The oldest brother and the family friend each testified that the family returned to Mexico after petitioner's birth, but that the two oldest boys remained behind to complete school (Tr. 23, 26, 42, 54). The district court found, in this regard, that petitioner's parents returned to Mexico in 1933, leaving petitioner's two oldest brothers in Nogales to complete the school year, and that the brothers attended public school in Nogales "through the school year ending in May, 1933" (Pet. Supp. App. A8).

At the conclusion of the trial, the district court held that the INS had established "by clear and convincing evidence, including cross-examination of [p]etitioner's witnesses, that [p]etitioner is not a natural born citizen of the United States" (Pet. Supp. App. A10). In reaching this result, the court pointed out that there was no contemporaneous official record of petitioner's birth in Nogales, Arizona, and that there was a contemporaneous official record of petitioner's birth in Imuris, Sonora, Mexico, on November 29, 1933 (*ibid.*).

3. On appeal, petitioner argued (Pet. C.A. Br. 20) that, because of the nature of the proceeding, the court of appeals could not defer to the district court's resolution of the conflicting evidence, but had to weigh the evidence independently. In response, the government contended (Gov't C.A. Br. 10) that it was up to the trier of fact to weigh the evidence and that the district court's factual determinations should be upheld on appeal unless clearly erroneous.

The court of appeals affirmed (Pet. App. A1-A5). The court first concluded that it would not depart from its "normal practice of rejecting a district court's findings of fact only if clearly erroneous" (*id.* at A3-A4, citing Fed. R. Civ. P. 52(a)). It then ruled that the district court's findings of fact were not clearly erroneous and that the district court properly could have concluded that the evidence — including petitioner's Mexican birth certificate, his lack of a United States birth certificate, and the fact that all of his American-born siblings possessed United States birth certificates — was sufficient, under the clear and convincing proof standard, to establish that petitioner is not a natural born United States citizen (Pet. App. A5).

ARGUMENT

Petitioner contends that the court of appeals failed to review the sufficiency of the evidence under the clear and convincing test, but instead applied the clearly erroneous standard. Petitioner's contention is based on a misreading of the court of appeals' opinion. Although the court's opinion is somewhat ambiguous in this regard (see Pet. App. A5), it seems tolerably clear that the court determined first, that the district court's findings of fact were not clearly erroneous, and second, that based on those findings, there was sufficient support in the record for the district court's conclusion that petitioner's Mexican birth was established by clear and convincing evidence.¹

¹The court of appeals' decision is thus fully consistent with such cases as *Chaunt v. United States*, 364 U.S. 350 (1960), and *Baumgartner v. United States*, 322 U.S. 665 (1944), in which this Court observed that a reviewing court must make an independent determination whether the government has met its burden of proof. To the extent that petitioner suggests (Pet. 17) that the reviewing court is also required to weigh the evidence and make *de novo* findings of fact, he is in error. This would render the district court proceedings essentially superfluous because it would require the reviewing court to redo precisely what the trial court

This fact-bound determination is clearly correct and does not warrant review. The evidence of record, when viewed (as it must be) in the light most favorable to the government, meets the "clear, unequivocal and convincing proof" test. Petitioner's contrary argument rests on the consideration in isolation of the facts that his birth was registered in Mexico and not in Arizona, and that the births of his Arizona-born siblings were registered in that State. Whatever evidentiary force these facts may individually lack, taken together they make a clear and convincing case that petitioner was born in Mexico—particularly in light of the evidence concerning Mexican birth registration procedures (see page 2, *supra*).²

has done, but without the benefit of having heard the witnesses. See *Agosto v. INS*, 436 U.S. 748, 757 (1978). The Court in *Chaunt and Baumgartner* did not suggest any departure from the usual rule that findings of a trial court with respect to historical facts are subject to review on the basis of the "clearly erroneous" standard. See *Pullman-Standard v. Swint*, 456 U.S. 273, 286-287 n.16 (1982). Application of the clearly erroneous standard is particularly appropriate here because the district court's findings of fact underlying its resolution of petitioner's nationality claim involved assessment of the credibility of the witnesses who testified at the trial (Pet. Supp. App. A9). See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 122-123 (1969).

Petitioner asserts (Pet. 17-19) that a conflict exists between the decision of the court below in this case and its prior decision in *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970). This Court, of course, does not resolve intracircuit conflicts. See *Wisniewski v. United States*, 353 U.S. 901 (1957). In addition, we note that the government's evidence in *Lim* consisted primarily of internally inconsistent statements from witnesses who did not testify at trial; thus, the district court was in no better position than the reviewing court to pass upon the witnesses' credibility. Moreover, unlike here, the government in *Lim* had no external, corroborative documentation of foreign birth.

²Indeed, petitioner's claim that he was born in Arizona is disproved by his own evidence. He does not dispute that he was born in November 1933. It was the testimony of petitioner's witnesses that, when his family returned to Mexico, his two oldest brothers remained behind to complete the school year (Tr. 23, 26, 42, 54). The district court found (Pet. Supp. App. A8) and the record showed (E.R. 69-74), however, that the brothers completed their American schooling in May 1933—six months before petitioner's birth.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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